1998

Steve Scott v. Linda Majors : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS

STATE OF UTAH

STEVE SCOTT,	:	**REPLY BRIEF**
Plaintiff/Appellee,	:	
vs.		
	:	Priority No. 15
LINDA MAJORS,		No. 980142
	:	
Defendant/Appellant		Appeal from the Third District Court,
	:	Summit County, Judge Brian, Judge Bohling

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LIST OF PARTIES

THE CAPTION OF THE CASE CONTAINS THE NAMES OF ALL PARTIES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Rules:

ARGUMENT

I. ISSUES OF MATERIAL FACT PRECLUDED THE COURT FROM GRANTING SUMMARY JUDGMENT.

A. The Trial Court Could Not "Weigh" the Evidence In Ruling on Summary Judgment.

In his brief the appellee claims that he is entitled to summary judgment because there is substantial evidence that supports his side. He specifically states ". . . she comes forward alleging facts which are contrary to substantial evidence in the record along with the claim that a procedural error prevented the Court from ruling on the judgment in this matter." Appellee's Brief pp 10-11.

By appellee's own admission there is a dispute as to the facts. Appellee, however, claims that he is entitled to summary judgment because the Court should believe him as opposed to the averments of the appellant. However, in reviewing a summary judgment motion the Court is precluded from weighing the testimony or the credibility of the witnesses. The Court must simply determine that there is no disputed issue of fact. Singleton v. Alexander, 19 Utah 2d 292, 294, 431 P.2d 126, 128 (1967); Spor v. Crested Butte Silver Mining, Inc., 740 P.2d 1304, 1308 (Utah 1987). Summary judgment is never used to determine what the facts are but only to ascertain whether there are any material issues of fact in dispute. Hill v. Grand Central, Inc., 25 Utah 2d 121, 123, 477 P.2d 150, 151 (1970).

When this case was initially decided and initially went to appeal the issue was whether there was a valid contract for the sale of the property from Ms. Majors to Mr. Scott. The trial court ruled there was and that decision was upheld. Based on that finding a judgment was entered

ordering Ms. Majors to sell the property to Scott under the terms of the REPC. Those issues are all res judicata. They are not in dispute in this action.

The factual dispute centers around what comes next. Ms. Majors argues that she was prepared to go forward under the terms of the REPC but that Scott and/or his counsel attempted to modify the REPC by requiring additional actions on Majors' part which were not part of the REPC agreement. R.376, R.398. The initial judgment of the Court, which was upheld by the Court of Appeals, did not order the property transferred to Scott. It simply ordered that the property be sold to Scott in accordance with the terms of the REPC. Ms. Majors claims that she attempted to sell it to Scott on that basis and Scott refused. Scott claims that it was not he but Ms. Majors who refused to go through with the deal. The issue as to who breached the contract is a material issue of fact which is clearly in dispute between the parties.

Because there was a disputed issue of material fact summary judgment could not issue in this action. Instead an evidentiary hearing was required. Since no evidentiary hearing took place the trial court's ruling must be overturned.

B. The Affidavit of Scott's Counsel Does Not Entitle Him to Summary Judgment.

Scott claims that he is entitled to summary judgment because of an affidavit filed by his counsel. This argument fails for a number of reasons. First, the affidavit of Scott's counsel does not address the specific facts that Ms. Majors alleges are in dispute. Ms. Majors specifically claims that Scott would not close the transaction unless Ms. Majors agreed to pay, what was then, an unliquidated claim for attorneys fees and costs of suit out of the escrow to Scott. According to Scott, counsels affidavit stated that "seller refused to close after she learned buyer was going to get a pre-judgment writ of attachment on the sale proceeds." Brief of Appellee, Page 11. This

statement, even if it were true and admissible, does not in any fashion "dispute" the facts and allegations set forth by Ms. Majors that Scott had initially refused to close the transaction.

It is well established that summary judgment need not be affirmed merely because the party opposing summary judgment did not file affidavits in order to avoid judgment against her. Mountain States Telephone & Telegraph Company v. Atkin, Wright & Miles, Chartered, 681 P.2d 1258, 1261 (Utah 1984); Town of Alta v. Ben Home Corp., 836 P.2d 797, 805 (Utah App. 1992). Scott can not rely solely on the fact that his counsel filed an affidavit. He was required to show how in some fashion that affidavit contradicted the material issue of fact raised by Ms. Majors. He has failed to do so.

C. Hansen's Affidavit Cannot Provide the Basis for Summary Judgment.

In order for an affidavit to be effective in determination of a motion for summary judgment it must set forth such facts as would be admissible in evidence. Norton v. Blackham, 669 P.2d 857, 859 (Utah 1983). Statements and arguments of lawyers are not evidence in a case, unless made as an admission or stipulation of fact. MUJI 1.3. Ms. Hansen's affidavit cannot be considered as evidence because she is counsel for Scott. If Ms. Hansen had intended to act as a witness it would have necessary for her to withdraw. Rule 3.7 of the Rules of Professional Conduct provides in pertinent part "a lawyer shall not act as advocate at trial in which the lawyer is likely to be a necessary witness . . ." Ms. Hansen has acted as counsel for Scott through all of the various proceedings in this matter. It is clear she was acting as counsel and not as a witness in preparing her affidavits and as such they are not evidence and cannot be the foundational basis for a summary judgment motion.

Even if Ms. Hansen's affidavits themselves could form the basis for a motion for summary judgment. They fail to set forth admissible evidence supporting her argument in this case. By her affidavit Ms. Hansen states that Ms. Majors refused to close after she learned Scott was going to get a pre-judgment writ of attachment on the sale proceeds. There is absolutely no foundation for this allegation.

Unless there is a claim that Ms. Majors directly told Ms. Hansen that Ms. Majors would not close because of a forth coming pre-judgment writ. Ms. Hansen's conclusion would not be admissible. It would either be hearsay, without an exception, or Ms. Hansen's unsubstantiated conclusion. A supporting affidavit must be based on the affiant's personal knowledge and an affidavit based merely on her unsubstantiated opinion and beliefs is insufficient. Treloggan v. Treloggan, 699 P.2d 747, 748 (Utah 1985). Ms. Hansen's personal beliefs as to why Ms. Majors took certain actions do not constitute admissible evidence.

D. Evidence of Negotiations Cannot Be Used to Defeat Ms. Majors Claims of Recision.

Scott argues that negotiations between the parties, and the amount paid by Ms. Majors to her attorneys for those negotiations, can be used as evidence to entitle him to summary judgment. Rule 408 of the Utah Rules of Evidence specifically precludes the use of evidence of negotiations in the fashion that Scott is attempting here. He cannot establish Ms. Majors liability or responsibility by using evidence of negotiations.

Whether or not Ms. Majors tried to resolve this matter short of declaring the contract void is completely irrelevant for purposes of these proceedings and the evidence used to purportedly prove such a proposition is inadmissable. Since all reasonable inferences must be drawn in Ms. Majors' favor, this argument fails.

II. MS. MAJORS DID NOT WAIVE HER RIGHT TO RECISION.

Ms. Majors has argued that Scott's insistence on escrowing funds for attorneys fees and costs and his demand for a mutual release constituted a counter offer or a material breach of the REPC. Scott has characterized that argument as an argument for recision. He then goes on to argue the law with respect to waiver.

Scott correctly sets forth the three requirements in order to find waiver. See Soter's v. Deseret Federal Savings and Loan, 857 P.2d 935, 939-940 (Utah 1993). The third element is the one that is critical for purpose of summary judgment here. That element requires "an intention to relinquish the right." Soter's at 940.

There is absolutely nothing that supports the contention that Ms. Majors ever relinquished her right for recision or intended to do so. Scott argues that a waiver should be inferred from the fact that Ms. Majors tried to negotiate a resolution to this matter. Clearly the attempt to negotiate a settlement does not in any fashion constitute an "intentional" waiver of Ms. Majors' rights. Furthermore, at the very best the contention that the negotiations could somehow play a part in this determination creates an issue of fact that must be determined by a fact finder. This matter is before the Court on summary judgment. Since all facts must be taken in the light most favorable to Ms. Majors, Scott's argument must fail.

III. THE MOTIONS WERE NOT RIPE FOR CONSIDERATION.

Scott cannot and does not argue that he properly submitted his motion for decision as required by Rule 4-501 of the Utah Code of Judicial Administration.

Instead Scott argues that the failure to follow the rules was "harmless error" and that accordingly the Court should overlook the failure to follow the statutory procedure.

The problem with Scott's analysis is the statute at issue does not provide legal room for a harmless error analysis. The rule states very plainly and simply "if neither party files a notice the motion will not be submitted for decision." It was improper to even schedule a hearing without having had the matter submitted for decision.

Scott argues that the Court would not have changed its mind had the correct procedures been followed. This begs the question of whether or not Ms. Majors would have been able to obtain competent legal counsel in time for the hearing. Ms. Majors has been hamstrung throughout these proceedings by severe financial problems. The net result has been that she has not been adequately represented through the bulk of these proceedings. Had Scott followed the correct procedure Ms. Majors may have been able to obtain adequate counsel and had counsel appear at the time summary judgment motions were being argued before the Court.

Since the Court did not have jurisdiction to rule on the issues because they were not properly before the Court the judgment should be voided and the matter returned for proceedings consistent with that ruling.

IV. SCOTT'S CLAIMS FOR COSTS, ATTORNEYS FEES, AND DAMAGES ARE BARRED BY THE UNITED STATES BANKRUPTCY CODE.

In his brief Scott goes through excruciating detail as to the "definition" of certain terms used in 11 USC §553(a), which is the section dealing with a party's right to set-off. The focus of Scott's argument seems to be on establishing on that the claimed fees and costs are to be considered a pre-petition debt and it should therefore be subject to the provisions in the set-off statute or in the alternative should be recoverable under the doctrine of recoupment. In his analysis however Scott misses the key factor which is the focus of Ms. Majors argument.

The key factor is that this is not a claim being made against Ms. Majors estate it is a claim against Ms. Majors personally. 11 USC §524(a)(2) states in pertinent part:

> (a) a discharge in a case under this title -- . . . (2) operates as an injunction against the commencement or continuance of any action, the employment of process, or any act to collect, recover, or off-set any such debt [discharged under §727, 944, 1141, or 1348 of this title] as a personal liability of the debtor or from property of the debtor, whether or not discharge of such debt is waived . . . .

The cases cited by Scott deal with claims against the estate of a debtor. They are not applicable to a case against a discharged debtor personally or against that discharged debtors assets that may exist after the bankruptcy.

The bankruptcy trustee abandoned the property and the contract. At the time those items were abandoned they reverted to Ms. Majors. The plain language of 11 USC §524(a)(2) prohibits any "off-set" against the debtor. When a court is interpreting a statute it does so by first referring to the statutes plain language. Stephens v. Bonneville Trust, Inc., 935 P.2d 518, 520 (Utah 1997). The plain language here prohibits the request for costs and fees made by Scott. Furthermore, when interpreting the statute the court assumes that the terms used in the statute were used advisedly and will not seek to change those terms. Reedeker v. Salisbury, 952 P.2d 577, 583 (Utah App. 1998). The use of the term "off-set" in this case is telling. It clearly does not relate solely to the doctrine of set-off but to any claims for an off-set such as the doctrine of recoupment.

The applicability of this language was recognized by the 10th Circuit Court in the case of In Re Davidovic 901 F.2d 1533 (10th Cir. 1990). In a footnote to that case, which was dealing with the issues of set-off and recoupment, the court stated:

> We also note but do not decide that a different result may obtain under either or both doctrines when a creditor asserts a right to set-off or recoupment in a personal action brought by the debtor alone, rather that an action brought by the bankruptcy trustee to recover assets for the bankruptcy estate.
>
> In Re Davodivic at 1539 n4

The case of In re Johnson, 13 B.R. 185 (Bankr M.D. of Tenn. 1981) is directly on point. Scott attempts to distinguish In re Johnson from the current case on two basis. The first basis is that the recovery was made under the Truth in Lending Act (TILA). The second differentiation is that the judgment obtained by the debtor was obtained post petition. Neither of these items are relevant for distinguishing the case from the facts before this court.

Nothing in the Johnson case restricts the courts analysis solely to TILA cases. The analysis the court and the facts the court examined fall squarely in the review of whether an entity who has a claim against a debtor pre-petition can use that claim to off-set damages post position. The court squarely held that it cannot, even where all the facts giving rise to the post petition claim occurred pre-petition.

The Johnson court specifically stated that whether or not the debtor's claim arose before bankruptcy was irrelevant for its analysis. The Court stated:

> The set-off provisions of §533(a), like it predecessor in the old act, permit a creditor to off-set a pre-petition debt owed the debtor against a claim against the bankruptcy estate. They do not allow a pre-petition creditor to off-set a claim against the debtor that has been discharged against a post petition liability to the debtor regardless of ***whether the cause of action may have arisen prior to the bankruptcy.***
>
> In re Johnson at 189 (emphasis added).

The law with respect to Scott's claim for recovery under the doctrine of recoupment or set-off is set forth clearly by statute. Those claims are not allowed. The attorneys fees and

costs claimed by Scott were discharged in the bankruptcy and may not be recovered against Ms. Majors post petition.

V. THE FEES, COSTS, AND DAMAGES AWARDED TO SCOTT ARE EXCES SIVE AND/OR UNRECOVERABLE AND RESULT IN DOUBLE PAYMENT.

A. Not all the requested attorneys fees are recoverable.

In Utah a prevailing party may not recover attorneys fees unless authorized by a statute or contract. Watkins & Campbell v. Foa & Son, 808 P.2d 1061, 1068 (Utah 1991).

In this case Scott claims that he is entitled to his attorneys fees pursuant to contract. The provision in the contract specifically dealing with attorneys fees is Paragraph 17 which reads "In any action arising out of this contract, the prevailing party shall be entitled to costs and reasonable attorneys fees."

"If provided for by contract, attorneys fees are awarded in accordance with the terms of that contract. Therefore, in determining whether Syscom was entitled to attorneys fees incurred on appeal based on the parties contract, we focus on the language of the attorneys fees provision."

America Rural Cellular, Inc. v. Systems Communication, Corp., 939 P.2d 185, 192 (Utah App. 1997). The attorneys fees provision applicable between the parties here restricts attorneys fees to those arising out of the contract between the parties. Clearly all of the fees and costs incurred in California in a separate bankruptcy proceeding were not involved in an action arising out of the contract. Ms. Majors was not even a party to the bankruptcy action. The parties are the Bankruptcy Trustee and the creditors. When a party is entitled to recover attorneys fees or costs under specific terms or a specific statute they are not entitled to receive

fees and costs recovered for items that are not covered by specific contractual provision or by the statute. See e.g. America Rural Cellular, Inc. v. Systems Communication, Corp., at 185 (disallowing recovery of attorneys fees for any claims not specifically related to recovery under a mechanics lien statute). Because the attorneys fees requested and charged are not within the scope of the attorneys fees provision of the contract they are excessive and must be denied.

B. The Damages Sought by Scott Are Not Allowable.

Scott is attempting to reap a double recovery in this case. He is seeking to receive the property and he is seeking to receive all the costs that he incurred initially in trying to obtain the property. Clearly he cannot have it both ways. All of the expenses he has listed are costs that he would have incurred and did incur in his attempt to purchase the property. He has the property. He is not entitled to receive a reimbursement of the costs that he would not have received had the contract been specifically enforced.

Scott argues that he is entitled to a pro ration of taxes for 1997. The problem is that Scott is claiming entitlement for rents for the entire year. If he is entitled to rents for the entire year he is subject to paying taxes for the entire year and cannot pass those costs on to Ms. Majors.

C. Plaintiff's Request for Costs Are Not Allowable.

In Scott's responsive memorandum he does not deny that all of the costs set forth in the memorandum costs and disbursements were for the litigation that Scott undertook against the bankruptcy trustee in the State of California.

The only tangential argument raised by Scott is that, since the contract provides for an award of costs, any costs incurred by Scott must be recoverable. Clearly the language of the

contract is not nearly so broad. Furthermore, the costs sought were not sought as a result of the contract but were sought as the "prevailing party" in this action. The only costs recoverable in this action would be the costs incurred in this action. The California litigation is completely separate and such "costs" not recoverable against Ms. Majors here.

CONCLUSION

This matter is before the Court on an appeal from a grant of a motion for summary judgment to Scott. That summary judgment was improper because issues of material fact exist. There is no admissible countervailing testimony on those issues of material fact. The matter must be remanded to the trial court for an evidentiary hearing on the issues as to the breach of the REPC.

The fees and costs which Scott is attempting to recover are barred by the United States Bankruptcy Code. They are an impermissible attempt to collect a debt from a debtor through the doctrines of recoupment and set-off. Additionally, the fees and costs sought are either not recoverable or are excessive. This case therefore should be remanded to the trial court with instructions to vacate the award of attorneys fees and costs.

Respectfully submitted,

DATED this 30th day of October, 1998

LARSON, KIRKHAM & TURNER

Shawn D. Turner

CERTIFICATE OF MAILING

I hereby certify that on this 30th day of October, 1998, I mailed, postage prepaid, a copy of the foregoing Reply Brief to the following:

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